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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 671

NATHAN SHURMAN and LOUIS CHEBATT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Nathan Shurman and Louis Chebatt, respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 28, 1955, reversing the

judgment of the United States District Court for the Northern District of Texas and remanding the cause for a new trial. The petition for rehearing was denied February 28, 1955.

THE OPINION BELOW.

The Court of Appeals for the Fifth Circuit reversed the judgment sentencing each of the petitioners to the custody of the Attorney General for a period of three years and remanded the case for a new trial. The opinion has not yet been reported. It appears in the Record at pages 166-185.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254 (1).

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QUESTIONS PRESENTED.

1. What should the Court of Appeals do when it determines that the government has failed to prove proper venue in a criminal prosecution? Should it reverse the case without remanding; or, as the Court of Appeals did here, may it reverse the case and remand it for a new trial?

2. What should the Court of Appeals do when it finds that certain statutory presumptions in a marijuana case were rebutted by the evidence so as to remove the case from the jurisdiction of the trial court? Should it remand the case to the same trial court wherein it has been determined by the Appellate Court that the trial court is without jurisdiction for failure of the government to have proved proper venue? The Court of Appeals for the 2nd and 7th Circuits under similar circumstances reverse without remanding. *U.S.* v. *Gillette,* 2 Cir. 189 F. 2d 449, 452. *U. S.* v. *Jones,* 7 Cir. 174 F. 2d 749. There is an apparent conflict between the Fifth and the Second and Seventh Circuits on this point.

3. Does this Court's opinion in the case of *Bryan* v. *United States,* 338 U.S. 552, decided January 16, 1950, control the question here? The *Bryan* case discussed the propriety of the ruling of the Fifth Circuit in remanding a case for a new trial where it held that there was insufficient evidence to support the verdict of the jury. This Court held that each of the Circuits may determine for itself whether to remand such a case or to reverse without so remanding. The precise point here was not discussed or decided by this Court because it was not in issue. The point at issue now is what the requirement of the Court of Appeals is in a case where the Appellate Court acknowledges that the government failed to prove venue in accordance with the Sixth Amendment to the Constitution of the United States.

SUMMARY STATEMENT OF MATTER INVOLVED.

The record is short and we can summarize the fact necessary to a disposition of this proceeding within a very narrow compass.

The petitioners were indicted on one count averring that they were the transferees of a quantity of marijuana on July 22, 1953, in Tarrant County, Texas in the Northern District of Texas without paying the special transfer tax upon the transfer thereof, they being transferees subject to pay said tax in violation of 26 U.S.C.A. Sec. 2593(a). The jury found both petitioners guilty, whereupon judgment was entered, and the court imposed a sentence of three years on each petitioner.

The salient facts are as follows: That on July 15, 1953 Federal Narcotic Agent William Findley spoke to the petitioners in Dallas, Texas. The petitioner, Shurman told him that he planned to go to Juarez, Mexico, to buy some marijuana. Thereafter Narcotic Agent Findley notified the State of Texas narcotic officers who were alerted to be on the lookout for the automobile of the petitioners when it would come back. A week later, on July 22, 1953 the petitioners were stopped near Fort Worth, Texas in Tarrant County in the Northern District of Texas, and their automobile was searched by state narcotic officers. The marijuana in question was found, the contraband and the defendants were turned over to the United States narcotic officers for prosecution.

When the marijuana was uncovered, it was found to be wrapped in a Mexican newspaper dated July 21, 1953, just a day before the afternoon of the arrest. An additional quantity of marijuana was found in a brown paper bag

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stamped with the printed name of a Juarez shop. The petitioners were apprehended on the highway leading directly from El Paso, Texas, just across the border from Juarez. El Paso, Texas, is not in the Northern District of Texas.

The petitioner, Shurman, testified that they left Juarez, Mexico, at about midnight on July 21, 1953, and drove continuously without stopping for rest until they were apprehended near Fort Worth, Texas.

REASONS FOR ALLOWANCE OF WRIT.

I.

We call to this Court's attention the opinion of the Fifth Circuit to this effect:

> "We agree with the defendants, however, that here the presumption was rebutted by the evidence; and since there was no evidence, other than the possession of marijuana in the Northern District of Texas, and the failure to produce the order form on demand, that it was acquired there, the prosecution failed to prove an essential element of the offense". (See opinion, R. 178).

Again the Court below stated:

> "However, in this case there was considerable evidence before the jury pointing to the conclusion that the marijuana was in fact obtained in Mexico or El Paso and not in the Northern District of Texas." (See opinion, R. 179).

Further the Court below held after analyzing the facts regarding the place of purchase or transfer of the marijuana concluded that:

> "Consequently we hold that there was a failure of proof to submit to the jury the question of venue which was essential to a conviction". (See opinion, R. 181).

The state of the record and proof adduced by the government is such that necessarily the Court of Appeals felt impelled to hold as it did. Is it not then the duty of the Court to reverse the case? What would a new trial within the Northern District of Texas avail the government? The facts produced by the government cannot be changed—even though they may be added to; but additional facts would not change the place of purchase of the marijuana for the

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indictment is laid in the wrong district. It is a violation of the Sixth Amendment to the Constitution to prosecute in such district. Oftentimes the venue question cannot be determined until after the government has presented its case. Beforehand, the indictment may not be amenable to a motion to quash for failure to set out proper venue. But if after the evidence is presented, the government fails to prove venue (as was here decided) what else is there to do but dismiss the case? The posture of the legal problem is different from that posed in the case of *Bryan* v. *U.S.*, 338 U.S. 552. One of the errors assigned in the instant petitioners' specification of errors was that the prosecution failed to prove venue as required by the Sixth Amendment to the Constitution of the United States. Such a proposition was upheld by the Court below. Accordingly, it is respectfully submitted that this results in a different finding than the finding in this Court's *Bryan* case for the reason that here there is no lack of evidence, the insufficiency of which the government can supply at a new trial. No new or additional facts can create venue in the Northern District of Texas.

The Sixth Amendment to the Constitution states:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law. . . ."

This Court decided in *U.S.* v. *Johnson,* 323 U.S. 273 that questions of venue raise deep issues that touch closely the fair administration of criminal justice. Under the provisions of the Sixth Amendment regarding procedural rights in criminal prosecution, proof of venue is an indispensable part of the government's case. *U.S.* v. *Gillette,* 2

Cir., 189 F. 2d 449, certiorari denied 342 U.S. 827. Venue is an essential part of the government's case where the government has the burden of proving it and without such proof there can be no conviction. *U.S.* v. *Jones,* 7 Cir., 174 F. 2d 746. The Second Circuit reversed the conviction and dismissed the indictment in a case where the crime charged took place in Manhattan, but the proof showed the acts took place in Brooklyn, a different judicial district. *U.S.* v. *Zeuli,* 137 F. 2d 845, 847.

II.

This prosecution proceeded under Sec. 2593(a) Title 26 U.S. Code, which states as follows:

> "It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Sec. 2590(a) to acquire or otherwise obtain any marijuana without having paid such tax; and proof that any person shall have had in his possession any marijuana, and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by Sec. 2591 to be retained by him, shall be *presumptive evidence of guilt* under this Section and of liability for the tax imposed by Sec. 2590(a)." (Emphasis added).

The question in the case became—where did the *transfer* of marijuana take place? The fact of possession within the Northern District of Texas was a fact which gave rise to a presumption of transfer. However, as it is said in 20 Am. Jur. Sec. 158, p. 163:

> " . . . Accordingly, the court will not define presumptions in such manner as to imply superiority over established facts. *Where facts appear, presumptions recede. . . .*"

This Court held in the case of *Casey* v. *United States,* 276 U.S. 413, that there must be a rational connection be-

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tween the fact proved and the ultimate fact presumed. In a 5 to 4 decision, this Court's majority fully discussed the question of venue. The case also involved narcotics and also a statutory presumption was relied upon to prove the ultimate fact of transfer within the District. Justice Holmes, writing the opinion, stated that because the possessor of the narcotics had stated to a witness that he did not have the narcotics but that he would get it in ten minutes, and later did have the narcotics, that this fact justified the presumption of purchase within the District. This Court determined that it was physically impossible to travel outside the District and return within ten minutes. Accordingly, it determined that there was a rational connection between the fact proved and the ultimate fact presumed. In the instant case the only rational connection between the facts as proved *by the government's own witnesses* and the presumption of transfer is that the transfer took place, as the Court of Appeals found, outside the Northern District of Texas. The Appellate Court held that *"there was failure of proof to submit to the jury the question of venue, which was essential to a conviction"*. (See opinion, R. 181). The decision in the Fifth Circuit in remanding the case is contradictory to and in conflict with the decisions of the 2nd and 7th Circuits in the cases of *United States* v. *Gillette,* 189 F. 2d 449 and *United States* v. *Jones,* 174 F. 2d 749. In the latter case, the Seventh Circuit Court of Appeals stated:

> "The government has a duty to perform. First it must prove its case on the record. And that includes the proof of venue . . . It follows that if there was a failure in proof of venue by the government, *such failure required acquittal,* and the court should have sustained the defendant's motion (p. 748) . . . It was a total failure of proof as to venue and the motion 'for discharge' at the conclusion of all the evidence should

have been sustained. *The judgment of the District Court is reversed.*" (p. 749, emphasis added).

We respectfully submit to this Court that such conflict between the Circuits is irreconcilable and is not conducive to the proper administration of criminal procedure in the Federal Courts; and accordingly ask this Court to grant the Writ for the purpose of supervising the proper procedure to be followed in the Courts of Appeals where it is found that venue has not been proven.

III.

This Court's decision in the case of *Bryan* v. *United States,* 338 U.S. 552, is not applicable to the question raised herein. In that case this Court reviewed a decision of the Fifth Circuit Court of Appeals to determine its power to grant a new trial under the circumstances of that case. As this Court said:

> "We granted Certiorari to examine the power of the Court of Appeals to grant a new trial *under the circumstances of this case.*" (p. 554). (Emphasis added).

Because the instant question has never been decided by this Court we respectfully submit that the question presented here ought to be determined by this Court as a guide in determining what course of procedure Courts of Appeals should take when it determines that, as a matter of fact, venue has not been proven. This question of doubtful venue may arise many times because of the increasing frequency of narcotic and marijuana prosecutions taking place. All of the cases involving possession of narcotics and marijuana require and rely upon the statutory presumption of transfer from the fact of possession. Accordingly, this Court's allowance of the Writ of Certiorari

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and its adjudication of this case thereupon would settle matters which are now left in a dubious state of limbo.

CONCLUSION.

For the foregoing reasons, we respectfully submit that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES and
FRANK W. OLIVER,
Attorneys for Petitioners

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OPINION.

Before BORAH, RIVES and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: Defendants were indicted and convicted of unlawfully obtaining 2047 grains of marihuana on July 22, 1953, in Tarrant County, Texas, in the Northern District of Texas, without paying the special tax upon the transfer thereof, they being transferees subject to pay said tax, in violation of 26 U. S. C. A. §2593 (a).[1] Before trial defendant Shurman moved to suppress certain evidence, namely, a quantity of a substance claimed by the Government to be marihuana, alleging that it was seized without a search warrant and without probable cause, in a search of Shurman's automobile by one Naylor, an officer of the State of Texas, made at the instance of, or in concert with, officers of the Federal Government. The trial court reserved decision upon the motion until after the evidence for the Government was presented. Both defendants pleaded not guilty, and the case was tried by jury. Motions of both defendants for judgments of acquittal were made and denied at the close of the Government's evidence and at the close of all the evidence. The jury found both defendants guilty and the trial court imposed sentences of three years' imprisonment on each.

[1] 26 U.S.C.A. §2593(a):

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form provided by Section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by Section 2590(a)."

The evidence for the Government was as follows: W. E. Naylor, a Texas law enforcement officer, testified that on about July 15, 1953, he received information by telephone from a Federal Narcotics officer named Findley, that Findley was informed and believed a car with a certain license number would be coming from El Paso to Fort Worth carrying narcotics. At about noon on July 22, 1953, Naylor stopped the defendants in a car with that license number and arrested them solely on the basis of the information from Findley. After placing them in the custody of a highway patrolman at a Justice of the Peace Court, he returned to search the car, and found in the trunk thereof two packages of what appeared to him to be marihuana. These packages he later turned over to Federal Narcotics Agent Johnson. Naylor thereafter placed the car in storage in order for it to be confiscated by the Federal Government, and notified Findley of the arrest. He was present when Findley made a thorough search of the car about five o'clock that afternoon. Naylor admitted he had neither a search warrant nor a warrant for the defendant's arrest. He identified the wrappings in which the alleged marihuana was found, one of which bore the name and address of a shop in Juarez, Mexico, and the other of which was a Juarez newspaper dated July 21, 1953.

Okla W. Johnson testified that as a Federal Narcotics Agent he had demanded a marihuana order form from the defendants on the day of the arrest, and had asked them if they had marihuana dealers' tax stamps, and that they answered that they had neither. J. W. Spillman testified that he was a Government chemist and that he made microscopic and chemical examinations of the substance turned over to him by Findley and Johnson; that in his opinion it was marihuana; and that the substance was finely cut up stems of the marihuana plant, and also resin and seeds of that plant.

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William T. Findley testified, with respect to defendant Shurman's motion to suppress, and outside the presence of the jury, that he was a Federal Narcotics Agent working undercover in Dallas in July, 1953; that he had purchased marihuana on four occasions in the first two weeks of that month from defendant Shurman; that Shurman told him he planned to go to Mexico the next day to buy marihuana; that Chebatt told him he had a source of heroin in Juarez and was going with Shurman intending to buy some; that Findley informed Naylor by telephone that he believed a car with license number HB-2752 would be coming from Juarez or El Paso with narcotics; that he did not ask Naylor to make any arrest; that during the following week he talked with Naylor twice by telephone and believed that they talked about the car; and that to his understanding there was no policy of the Federal Narcotics Bureau to have arrests made in such cases by state police, but that the Bureau keeps constantly in touch with state and city enforcement agencies, not working together, but for the common interest of crime prevention. On this evidence the trial court overruled the motion to suppress.

The only witness for the defense was defendant Shurman, who testified that he was an itinerant saxophone player; that he went to Juarez around July 5, 1953, to get a job as musician in a band; that he left Juarez about midnight, July 22, 1953, and drove straight towards Fort Worth; that the automobile was his but that he knew nothing about the alleged marihuana in the trunk of the car; that he suspected that it was planted there by a Juarez cab driver with whom he had had an argument; that he stopped between El Paso and the place of arrest just west of Fort Worth only for gas and to call his wife; and that he did not see or talk with anyone.

Both defendants appeal from the conviction, specifying the following as errors:

I. The court erred in failing to suppress the evidence upon motion properly made, because of an illegal search and seizure in violation of the Fourth and Fifth Amendments.

II. The prosecution failed to prove proper venue and place of the offense.

III. The prosecution failed to prove that a notice and demand for an order form was made by the Collector of Internal Revenue upon the defendants in accordance with 26 U. S. C. A. §2593(a).

IV. The court erred in refusing to give certain instructions, and in giving certain erroneous instructions.

Although we must reverse the judgment of the trial court on the second ground, we will discuss all of the assigned specifications of error for the guidance of the court on another trial.

I. SEARCH AND SEIZURE:

Two questions are presented here. The first is: Would the search as conducted by the state officers have been illegal if it had been conducted by federal officers? The second is: If the search was illegal, was there such "co-operation" between the state and Federal officers as would proscribe the evidence when later offered in a federal prosecution? It is not necessarily true that if an illegal search is made by state officers the fruits of the search are suppressed when offered in evidence in a federal prosecution. *Scotti* v. *United States,* 5th Cir., 193 F. 2d 644.

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As to the first of these two questions, our recent decision of *Rent* v. *United States,* 209 F. 2d 893, we believe to be controlling on the question of the lawfulness of the search by the state officers here. In that case the occupants of an automobile were arrested and the car was taken into custody, locked, and parked overnight in a police parking lot. We held that a search made the next morning without a warrant was unreasonable; even though the officers had grounds which seem as strong as those in the present case to believe there was marihuana in the car,[2] the opportunity after the arrest to obtain a search warrant was a factor to be considered together with those grounds, in determining the reasonableness of the search. So considered, we concluded that the search violated the Fourth Amendment. The lack of a warrant could not be excused, either under the principle of search incident to arrest, the search and the arrest not having been contemporaneous; or under *Carroll* v. *United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790, because the danger that the automobile might be quickly moved from the locality,

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[2] The officers had received a tip about a cache of marihuana in a certain vicinity, which they took under surveillance. 209 F. 2d 893, 895: "The officers testified that a street light on the corner furnished sufficient light for them to observe the occurrences. Rent opened the right hand door of the automobile, bent over inside, and then straightened up and lit a cigarette . . . Griffin was of the [expert] opinion from the manner in which Rent smoked this cigarette that it was a marihuana cigarette . . . ." The officers watched the car constantly thereafter until the defendants were arrested. They saw one of them pick up a cigarette known to be a marihuana from the ground, then made the arrest. At that time they found a marihuana cigarette butt near where they saw Rent flick his stub.

basic to the *Carroll* decision, was lacking under these circumstances.[3]

In the present case, the car had been left beside the highway after the arrest, and not on a police parking lot; and there was evidence that the trunk of the car would not lock; however, the differences between these facts and those in the *Rent* case do not seem to us a sufficient basis to apply a different rule here. In the present case, the state officer had the car keys and the car was "not likely to be disturbed," 209 F. 2d 897, and this is the same essential state of facts as that in the *Rent* case. We hold, therefore, that this search was illegal.

But as to the second question, even though the search was illegal, the evidence was nevertheless not inadmissible, because there was not shown to have been participation by federal officers or such cooperation between them and state authorities in making the search, as to prevent the use of the evidence seized by the state officers, in a federal prosecution.

The defendants sought to establish a pattern of cooperation between state and federal authorities, amounting to a custom that state cases would be turned over to federal officers for adoption, to bring this case within the decisions that evidence illegally obtained by state officers where such

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[3] As we interpreted **United States v. Rabinowitz, 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653,** in the **Rent** case, the Supreme Court meant there to relax the strict requirement of a search warrant only where a search is made contemporaneously with a valid arrest and of the arrested person and the immediately surrounding premises under his control; or where there is a strong likelihood that evidence will be lost unless an immediate search is made.

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a pattern is present is not admissible in a federal prosecution.[4] Such a pattern is not established by the evidence, and in fact the weight of the evidence in the record is against the defendants' contentions. Agent Findley testified that according to his understanding, it was not the Bureau's policy to have automobiles suspected of containing narcotics stopped by the state police. There was no evidence of any tacit understanding to do this between state and federal authorities, although the defense sought by repeated questions to show that there was such an understanding. It was admitted that they "kept constantly in touch" but it was expressly denied at the same time that they "worked together." There was not even any evidence that the majority of narcotics law violators apprehended by state police in the area had been turned over for federal prosecution in the past. Thus, there was here not even this element, which was held not to be sufficient standing alone to establish the existence of such a custom in *Scotti* v. *United States, supra.*

In the absence of proof of such a custom, then, the only facts shown by the evidence which tend to show cooperation between state and federal enforcement agencies were the passing on of the information from Findley to Taylor that he believed a car with a certain license number would be coming down a certain highway containing narcotics; the two telephone conversations thereafter in which the car was mentioned; the fact that a federal officer made a second search some four hours after the search by the state officer; the fact that the state and federal officers frequently exchanged information; the turning over of the

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[4] **Fowler v. United States, 7th Cir., 62 F. 2d 656; Lowrey v. United States, 8th Cir., 128 F. 2d 477; United States v. Irwin, W.D. Ark., 86 F. Supp. 362.**

case to federal authorities after the search; and the adoption of the case by them.

First, as to the federal officer's search, it is significant that it was made quite independently and long after the first search and discovery of the evidence was complete. This was not participation in the illegal seizure of the evidence. *Cf. Lustig* v. *United States,* 338 U. S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819. And this second independent search bespeaks cooperation only to the same extent that federal adoption of the prosecution does, and is not a significant element of cooperation additional to the adoption. We do not consider the post-seizure occurrences, the later search and adoption of the prosecution, as indicating significantly and antecedent attempt by federal officers to do indirectly what they could not do directly. The fact that the federal officers kept "constantly in touch" with state officers, and that Findley gave the information which led to the arrest and had two telephone conversations in which Shurman's car was mentioned, are the main circumstances on which the defendants urge us to find there was here such an attempt.

To find that these matters do establish such a degree of cooperation as to bar the evidence illegally seized by state police, would be to infer an attempt by federal authorities to do indirectly what the Fourth Amendment forbids them to do, from facts which on their face indicate a laudable comity in law enforcement. Without some showing of a tacit or expressed understanding, difficult though it may be to find proof thereof, we would be unwilling to hold that giving of information which results in an illegal search, constitutes an attempt to procure evidence illegally.

The case most nearly in point is *Sloane* v. *United States,* 10th Cir., 47 F. 2d 889, where it was held that mere pass-

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ing on of a tip as to the location of a still, by a federal to a state officer, followed by an illegal search by the state officer and federal adoption of the prosecution, did not alone constitute cooperation.[5]

In *United States* v. *Lustig,* 3rd Cir., 159 F. 2d 798, the Third Circuit decided that the passing on of information to state officers by a federal agent that persons he believed were guilty of a state offense were present in a certain hotel room, plus the fact that after apprehension of the suspected persons and an unlawful search revealing counterfeiting apparatus they were turned over for federal prosecution, did not add up to that degree of cooperation which would make the evidence seized inadmissible under the Fourth Amendment. The *Sloane* case was cited as authority for this. On certiorari to the Supreme Court, the case was reversed on a different ground. *Lustig* v. *United States,* 338 U. S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819. The ground of reversal was that the record showed that the federal officer, after Lustig's arrest, entered the hotel room while the state officers were searching it, and participated in the search before it was completed, by evaluating the evidence as an expert on counterfeiting, as it was uncovered. The Supreme Court declined to pass on the principle relied upon by the Court of Appeals, 338 U. S.

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[5] Our present case, like the **Sloane** case, is distinguished from **Gambino v. United States,** 275 U.S. 310, in that there the state officers were acting solely to aid in the enforcement of federal law. Here, possession of marihuana violates Texas law. Vernon's Texas Penal Code, Art. 725b.

79; and thus, the reversal of Lustig's conviction has not weakened the authority of the *Sloane* case.[6]

The reasoning of the *Sloane* case seems correct. We cannot denounce such exchange of information between law enforcement agencies where no attempt is otherwise shown to do indirectly what is prohibited to do directly. Furthermore, it should be noted that the basis of our holding herein that what was done here by the state officer was improper, is not that there was not probable cause for the search,[7] but merely a failure to obtain a search warrant when it might well have been obtained, or to make a search of the car at the time of arrest. It would be strange indeed to say that the federal agent meant to induce an illegal search, when it appears that the search could very easily have been made lawfully by the state

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[6] As we intimated earlier, the Supreme Court's holding in the **Lustig** case is easily distinguishable from the facts before us, because there was in that case actual participation in the uncovering of the very evidence sought to be excluded; the federal officer was "in it before the object of the search was completely accomplished." 338 U.S. 74, 79. Here, the search in which the marihuana was found was completed hours before the federal officer commenced his independent quest for heroin.

[7] **Cannon v. United States, 5th Cir., 158 F. 2d 952, cert. den. 330 U.S. 839, 67 S. Ct. 980, 91 L. Ed. 1286; Medina v. United States, 5th Cir., 158 F. 2d 955; Turner v. Camp, 5th Cir., 123 F. 2d 840. Cf. Husty v. United States, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629; Kelly v. United States, 5th Cir., 197 F. 2d 162; United States v. Li Fat Tong, 2d Cir., 152 F. 2d 650.** And even though Texas courts take a narrower view of what constitutes probable cause (**Nowlin v. State, 148 Tex. Cr. R. 563, 189 S.W. 2d 871; Timberlake v. State, 150 Tex. Cr. R. 375, 201 S.W. 2d 647**), Naylor could certainly have obtained a search warrant if he had obtained Findley's testimony that defendants had told him they intended to bring narcotics from Mexico.

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officer. At any rate, the mere giving of the information we do not regard as requesting any action whatsoever, in the absence of an understanding, voiced or tacit, to that effect; much less do we consider it an instigation of an unlawful search.

With respect to defendant Chebatt, there is an additional ground for holding the evidence admissible, namely, that he asserted no proprietary or possessory interest in the car or the marihuana, and therefore cannot complain that the search or seizure was unlawful. *Cantrell* v. *United States,* 5th Cir., 15 F. 2d 953, cert. den. 273 U. S. 768, 47 S. Ct. 572, 71 L. Ed. 882; see also *Goldstein* v. *United States,* 316 U. S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312, and authorities cited at 316 U. S. 121.

We hold, therefore, that the court did not err in overruling the motion to suppress.

II. VENUE:

The statute under which the defendants were convicted, 26 U. S. C. A. §2593(a), creates a presumption from the fact of possession of marihuana plus the failure to produce the order form upon demand, that the marihuana was acquired in violation of the statute. Defendants argue (A) that the statutory presumption of guilt attaching from the possession of the drug and failure to produce the order form, does not carry with it a presumption that the crime was committed at the *place* where possession is proved, and (B) that the evidence rebuts any such presumption.

A. Although the early cases cited by defendants' brief (*Brightman* v. *United States,* 8th Cir., 7 F. 2d 532; *Cain* v. *United States,* 8th Cir., 12 F. 2d 580; *Graham* v. *United States,* 8th Cir., 15 F. 2d 740; *Donaldson* v. *United States,* 8th Cir., 23 F. 2d 178; and *Hood* v. *United States,* 8th Cir., 14 F. 2d 925), as well as *De Bellis* v. *United States,* 7th

Cir., 22 F. 2d 948, support the contention that the presumption created by such statutes does not extend to the place and venue of the offense, all of the more recent cases and the weight of authority are to the contrary. While the opinion of the Supreme Court in *Casey* v. *United States*, 276 U. S. 413, 48 S. Ct. 373, 72 L. Ed. 632, is not precisely in point, it seems to approve the reasoning of the Court of Appeals' opinion in the same case, 9th Cir., 20 F. 2d 752, that the presumption does extend to venue. See also the note in 13 Cornell L. Q. 627. All cases since *Casey* v. *United States* have held so. *Acuna* v. *United States*, 5th Cir., 74 F. 2d 359; *Landsborough* v. *United States*, 6th Cir., 168 F. 2d 486; *Anderson* v. *United States*, 6th Cir., 189 F. 2d 202; *United States* v. *Stallsworth*, 7th Cir., 193 F. 2d 870; cert. den. 343 U. S. 942, 72 S. Ct. 1035, 96 L. Ed. 1347; *Rosenberg* v. *United States*, 9th Cir., 13 F. 2d 369; *Jones* v. *United States*, 10th Cir., 193 F. 2d 115; *Killian* v. *United States*, D. C. Cir., 29 F. 2d 455, 58 App. D. C. 255; *Goode* v. *United States*, D. C. Cir., 149 F. 2d 377; *Frazier* v. *United States*, D. C. Cir., 163 F. 2d 817. See also *Charley Toy* v. *United States*, 2d Cir., 266 Fed. 326, cert. den., 254 U. S. 639, 41 S. Ct. 13, 65 L. Ed. 452. In this Circuit, then, this proposition is so firmly established as to be beyond dispute.

B. We agree with the defendants, however, that here the presumption was rebutted by the evidence;[8] and since

[8] There is no unanimity among the authorities as to the effect to be given such a rebuttable presumption. Wigmore says that the presumption disappears from the case as soon as **some** evidence negativing the inferred facts is introduced. 9 Wigmore, Evidence §§2491, 2498a. But some cases hold that the presumption is destroyed only by **substantial** evidence to the contrary. **Coffin v. United States, 156 U.S. 432, 162 U.S. 664, 15 S. Ct. 394, 16 S. Ct. 943, 39 L. Ed. 481, 40 L. Ed. 1109;** but see 9 Wigmore, Evidence §2511 note 4. Whatever the general rule, it is noteworthy that

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there was no evidence, other than the possession of marihuana in the Northern District of Texas and the failure to produce the order form on demand, that it was acquired there, the prosecution failed to prove an essential element of the offense.

The mere self-serving testimony of the defendant (*Frazier* v. *United States,* D. C. Cir., 163 F. 2d 817) or his family (*Landsborough* v. *United States,* 6th Cir., 168 F. 2d 486) that the narcotics were obtained elsewhere than the place of apprehension, may properly be regarded as of less weight than the circumstance of possession in the particular district; and the jury may by virtue of the statutory presumption find the defendant guilty where the inference that the narcotics were obtained in the particular district is negatived only by such evidence. See also *Goode* v. *United States,* D. C. Cir., 149 F. 2d 377. However, in this case there was considerable evidence before the jury pointing to the conclusion that the marihuana was in fact obtained in Mexico or El Paso and not in the Northern District of Texas. Even if we discount entirely Shurman's self-serving testimony denying any knowledge of the marihuana and claiming he had driven all the way from Mexico without stopping except for gasoline and without talking to anyone, we cannot ignore the arresting officer's highly credible testimony before the jury that Findley had alerted him that Shurman's car was *in El Paso*

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the statutory presumption with which we are dealing is constitutionally valid only because there is a rational connection between the fact proved and the ultimate fact presumed. **Casey v. United States, supra; Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519.** This kind of presumption, then, would seem to be no stronger than this rational connection, and to be rebutted when other evidence of equal persuasiveness, implying a contrary result, is introduced.

and would be coming *from El Paso* with narcotics. There was no objection to this testimony. Although it was hearsay and perhaps partly an opinion or conclusion, it is *relevant* to the question whether the marihuana was in fact acquired in the Northern District, and tends to show with enough force to be entitled to serious consideration that it was not obtained there. Any exclusionary rules of evidence barring this testimony were waived. Findley testified to the jury that it was as a result of a conversation with the defendants on July 14th[9] that he informed Naylor on the 15th that the car would be coming from El Paso, and this also tends to strengthen the inference that the marihuana was not purchased in the Northern District of Texas. Combined with this evidence are circumstances which lend striking support to the inference that the marihuana was brought by the defendants from the vicinity of El Paso. These were the facts that part of the marihuana was found wrapped in a Juarez, Mexico, newspaper dated the date before the arrest, and the rest was wrapped in a paper sack bearing the printed name of a Juarez shop, and that the defendants were apprehended

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[9] The substance of this conversation of July 14th was disclosed by Findley in his testimony on the motion to suppress, given while the jury was withdrawn. This was to the effect that Shurman told him that he intended to go to Juarez, Mexico, to purchase marihuana. If this testimony could properly be considered by the court on the motion to acquit, its probative effect would be quite substantial, since of course it may be inferred from a person's statement that he intended to do something, that he later actually did it. **Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 295, 12 S. Ct. 909, 36 L. Ed. 706.** However, we find no authority for this proposition that evidence given outside the presence of the jury ought to be considered by the court on a motion to acquit. We, therefore, give no weight to this evidence in our consideration of the case.

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on the highway from El Paso coming from that direction. We are inclined to think that of the two hypotheses, (1) that the marihuana was brought from Juarez or El Paso (just across the river) that very day by defendants, or (2) that the marihuana had just been brought thence by another person and immediately sold to defendants in the Northern District, or that it had been rewrapped by them in a newspaper just brought from Mexico, the former is more in conformity with these circumstances; particularly since it is apparent that defendants had no reason to create false evidence. They could hardly have anticipated that they would be prosecuted under this statute (instead of the Texas Penal Code or Federal customs laws) or that this peculiar issue would arise.

The sum of this evidence constitutes, in our mind, substantial evidence countering the statutory presumption from the single circumstance of possession in the Northern District without an order form. That single circumstance, once countered by substantial evidence, is but a circumstance like any other, and weighing the combined evidence, we do not think a jury could reasonably conclude that it excluded every reasonable hypothesis except that there was an acquisition of marihuana in the Northern District by these defendants.[10] Consequently we hold that there was a failure of proof to submit to the jury the question of venue, which was essential to a conviction.

III. NOTICE AND DEMAND:

Defendants make much of the fact that the proof showed a demand for the order form for narcotics was made only by a Narcotics Agent, although 26 U. S. C. A. §2593(a)

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[10] For the test to be applied by appellate courts in a situation of this kind see **Vick v. United States, 5th Cir., 216 F. 2d 228, 232.**

creates the presumption of illegal purchase only after the person possessing narcotics shall have failed "after reasonable notice and demand by the Collector" to produce the order form. The Government having presented in a supplemental brief the text of departmental orders[11] showing that a delegation of this function to Narcotics Agents has been made, defendants reply with a contention that such delegation is invalid because administrative rule-making cannot change specific statutory provisions. The departmental orders set forth in the footnote speak for themselves that a delegation was attempted; furthermore, we are satisfied that such delegation was an effective exercise of rule-making power which did modify the statute. These orders were made pursuant to the Reorganization Act of 1949, 5 U. S. C. A. §§133z-133x-15, which vests in the President extremely broad powers of a quasilegislative nature, to submit to Congress reorganization plans which may include the transfer of the statutory functions of one

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[11] 17 F. R. 9051:

"OFFICE OF THE SECRETARY

(Treasury Department Order No. 157)

COMMISSIONER OF CUSTOMS AND COMMISSIONER OF NARCOTICS DELEGATION OF FUNCTIONS

"By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950, there are hereby transferred to the Commissioner of Customs and the Commissioner of Narcotics, to be exercised by either one of them separately, the functions relating to notice and demand to produce order forms for marihuana under section 2593 of the Internal Revenue Code.

"The functions herein transferred may be delegated by the Commissioner of Customs and the Commissioner of Narcotics to subordinates in their respective bureaus.

"Dated: October 1, 1952.

E. H. Foley
Acting Secretary of the Treasury

(SEAL)

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agency to another; which plans are to become effective with the full effect of law sixty days after submission to Congress (Congress being in continuous session for that period) unless either House adopts a resolution by majority vote disapproving the plan, within such sixty-day period. Under this Act the President submitted Reorganization Plan No. 26 of 1950, 15 F. R. 4935, to both Houses, and it became effective July 31, 1950, and was duly published in the Statutes at Large, 64 Stat. 1280-1281, in accordance with 5 U. S. C. A. §133z-9. The departmental orders set out in the footnote were made in strict accordance with §2 of Reorganization Plan No. 26 of 1950. Therefore, because of the extraordinary nature of the

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"(F.R. Doc. 52-10955; Filed, Oct. 9, 1952; 8:45 a.m.)"
17 F. R. 9051:

"DEPARTMENT OF THE TREASURY
Bureau of Narcotics
(T. D. No. 46)
DISTRICT SUPERVISORS AND AGENTS
DELEGATION OF FUNCTIONS

"The Secretary of the Treasury, by Treasury Department Order No. 157, transferred to the Commissioner of Narcotics the functions relating to notice and demand to produce order forms for marihuana under section 2593 of the Internal Revenue Code (26 U.S.C. 2593) and authorized the delegation of such functions to subordinates of the Bureau of Narcotics. Accordingly, the Commissioner of Narcotics hereby delegates such functions to the district supervisors and agents of the Bureau of Narcotics.

"This delegation of functions shall take effect upon publication in the Federal Register.

H. J. Anslinger
(SEAL) Commissioner of Narcotics
"Approved: October 1, 1952.
E. H. Foley
Acting Secretary of the Treasury
"(F. R. Doc. 52-10956; Filed Oct. 9, 1952; 8:46 a. m.)"

President's powers under the Act, these orders have effectively transferred the function of making the demand for the order form to all Narcotics Agents.

IV. ALLEGED ERRORS IN INSTRUCTIONS TO JURY:

A. As to the trial court's instruction with respect to proof of the place the offense was committed, we find it unnecessary to pass upon this in view of what we have said on the subject of venue.

B. The trial court's refusal to charge the jury concerning the notice and demand for the order form, if erroneous, was harmless, because the evidence was uncontradicted that such reasonable notice and demand were in fact made by an authorized officer. Certainly it was not error to refuse defendants' requested charge, which was predicated on the erroneous premise that such notice and demand had to be made by a Collector of Internal Revenue, as if the departmental orders discussed above were of no effect.

C. This brings us to the defendants' final specification of error, the court's refusal to give the instruction requested by defendants quoting the statutory definition of marihuana, 26 U. S. C. A. §3238(b),[12] and instructing that

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[12] 26 U.S.C. § 3238: "Definitions * * * *

"(b) Marihuana. The term 'marihuana' means all parts of the plant, Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds, of resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination."

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the defendants should be found not guilty unless the jury found that the Government chemist made his analysis with due regard for the statutory exclusion of certain parts of the marihuana plant from the definition of marihuana.

The definition of marihuana in the statute is complicated and confusing. The court declined to permit unqualified witnesses to testify that the seized articles contained marihuana, thus correctly indicating that such a determination was one in which the jury needed the assistance of expert opinion. Unquestionably, therefore, the court should have given to the jury a definition of marihuana, even though the charge requested was, as to its second part, itself unclear. The chemist testified that he made both a chemical and microscopic test and found resin present. The fact that he also found present particles of the plant *cannabis sativa* that are excluded from the definition, did not prevent the jury from considering whether there was also present resin from the plant; for them to do this they needed an appropriate instruction from the court.

We have discussed the points raised on this appeal at some length because the case must go back for a new trial and the trial court is entitled to have such guidance as is available from our views on the points specifically raised.

The judgment is reversed and the case remanded for a new trial.

JOHN A. FEEHAN, J.

JUDGMENT.

January 28, 1955.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial.

ORDER DENYING REHEARING

February 28, 1955.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 671

NATHAN SHURMAN AND LOUIS CHEBATT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13-31) is reported at 219 F. 2d 282.

JURISDICTION

The judgment of the court of appeals (Pet. 32) was entered on January 28, 1955, and a petition for rehearing was denied on February 28, 1955 (Pet. 32). The petition for a writ of certiorari was filed on March 24, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was precluded from remanding a case for a new trial and was required to direct the entry of a judgment of acquittal when it ruled that the evidence was insufficient to establish venue, petitioner having moved for a new trial in the district court specifying lack of venue as a ground, and having assigned as error on appeal the failure to order a new trial.

STATUTES INVOLVED

26 U. S. C. 2593(a):

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).

28 U. S. C. 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause

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and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals for the Fifth Circuit (Pet. 32), remanding this case for a new trial upon reversal of the judgment of the District Court for the Northern District of Texas (R. 144-145) finding petitioners guilty of obtaining marihuana without payment of tax, in violation of 26 U. S. C. 2593(a).

The testimony from which the presumptions and inferences as to the place of commission of the offense were derived may be summarized as follows:

On July 22, 1953, at about noon, petitioners were apprehended by W. E. Naylor, a Texas law enforcement officer, in a car owned by petitioner Shurman, about 10 or 15 miles from Fort Worth, on the road from Weatherford within the Northern District of Texas (R. 21, 29). Marihuana was found concealed in the car (R. 24-27, 40). Naylor had received phone calls from William T. Findley, a federal narcotics agent, alerting him to the car's being en route from El Paso (R. 30-37, 42, 91-94).

Outside the presence of the jury, with respect to Shurman's motion to suppress evidence, Findley testified that he was working as an undercover agent in Dallas, Texas, in July 1953 (R. 64); that he had purchased marihuana on four occasions in

the first two weeks of that month from Shurman (R. 65-68); that on or about July 15 Shurman had told him that he and Chebatt were going to Juarez, Mexico, to purchase marihuana and heroin (R. 68-69, 71-72); that he, Findley, several times informed Naylor by telephone that he believed a car with the specified license number would be coming from Juarez or El Paso with narcotics (R. 69, 73); that petitioners had not been put under surveillance and Findley did not know whether they went to Juarez, Mexico or not (R. 72).

The marihuana found in the car was wrapped in part in a bag which bore the name and address of a shop in Juarez, and the remainder was wrapped in a Juarez newspaper dated the day before the arrest (R. 39-41). No heroin was found (R. 81-82).

Shurman testified that his trip to Juarez had been solely for the purpose of obtaining employment there as a saxophonist (R. 102, 108, 112); that he could not account for the presence of the marihuana except as a matter of vengeance arising from an altercation in Juarez (R. 104-107, 122); that he and Chebatt had left Juarez at about midnight and driven continuously throughout the night and morning until the time of the arrest (R. 101, 103, 111); that stops had been made to phone his wife from El Paso and to get gas (R. 103, 111, 127); that he could not recall the places where the stops for gas had been made (R. 127-128); and that he had not seen or talked with anyone other than Chebatt during the trip from El Paso (R. 103, 128-129).

Petitioners' motions for acquittal at the close of

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the government's case and at the close of Shurman's testimony were denied (R. 97, 131). The judge charged the jury, *inter alia* (R. 134):

> You must not only find the defendants guilty in the acquisition of the drug itself, but it is incumbent upon the government to prove the venue, and if you should find and believe that transaction occurred some other place other than in the Northern District of Texas, the defendants would be acquitted.

The jury returned a verdict of guilty (R. 141). Petitioners then filed motions for judgment notwithstanding the verdict and in arrest of judgment (R. 141-142), and a motion for a new trial (R. 142-143). These were denied.

The statement of points to be relied on upon appeal included the point (R. 157):

> 15. That the Court erred in denying the defendants' motion for a new trial.[1]

The court of appeals held that the rebuttable statutory presumption of venue from possession was rebutted by evidence that the marihuana had been obtained in Juarez or El Paso; and that there was therefore insufficient proof of venue to justify submission of the case to the jury. It thereupon

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[1] In their brief before the court of appeals, petitioners argued that the judgment should be reversed "and this cause dismissed" (p. 26), and stated that the question of error in failing to acquit because of lack of venue "arose on defendants' [motions for acquittal, judgment notwithstanding the verdict and in arrest of judgment] and Motion for a New Trial" (p. 8).

reversed the judgment and remanded the cause for a new trial (Pet. 23-27, 31).

ARGUMENT

Petitioners, who asked for a new trial on the ground that venue had not been proved, are not in a position to complain of the grant of their motion by the court of appeals. In this and all other controlling respects, the case is governed by *Bryan* v. *United States*, 338 U. S. 552, in which this Court reaffirmed the propriety of a grant of a new trial requested by the defendants themselves, even though the court of appeals in *Bryan*, as in the instant case, held that on the evidence adduced an acquittal should have been directed below.[2] As stated in *Bryan* (338 U. S. at 560):

> "* * * where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." *Francis* v. *Resweber*, 329 U. S. 459, 462. See *Trono* v. *United States*, 199 U. S. 521, 533-34.[3]

Once it is determined that the court below had jurisdiction to order a new trial rather than a dis-

[2] This power to grant a new trial had previously been exercised without question. *Wiborg* v. *United States*, 163 U.S. 632; *Clyatt* v. *United States*, 197 U.S. 207.

[3] The recent decision in *Sapir* v. *United States*, 348 U.S. 373, in which this Court ordered a dismissal of an indictment, is distinguishable because the Court considered that the original judgment ordering dismissal was correct on its merits and found it unnecessary to pass on the appellate court's power subsequently to order a new trial. Moreover, that case is also distinguishable upon the basis stated in the concurring opinion of Mr. Justice Douglas that Sapir had not asked for a new trial.

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missal, there is no reason in this case for this Court to review the manner in which that jurisdiction was exercised. It must be assumed that the court was satisfied on the basis not only of the evidence which went to the jury, but also on the additional testimony received by the trial court on the motion to suppress, that the possibility of establishing venue under the indictment was not entirely foreclosed. In granting a new trial upon the record before it, the court of appeals was clearly within the statutory authority to remand for such further proceedings "as may be just under the circumstances" (*supra*, p. 3).[4]

CONCLUSION

The question presented in this case was decided below on the basis of its particular facts. No conflict of decisions of law is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
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WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

APRIL, 1955.

[4] While the court of appeals was, therefore, correct in ordering a new trial rather than acquittal upon the actual record before it, if the government concludes that it cannot establish jurisdiction in the northern district, it will of course be necessary to move to dismiss.

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